Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

RELIABLE CONSULTANTS, INC.,
d/b/a DREAMERS,
Petitioner,

v.

CITY OF KENNEDALE, TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 21, 2007

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QUESTIONS PRESENTED

1. Whether a court of appeals assessing the constitutionality of an adult business ordinance under *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), is required to give deference to the district court's factual findings underlying the conclusion that a municipality's evidence does not reasonably support its rationale.

2. Whether a court of appeals reviewing the constitutionality of an adult business ordinance under *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), must conduct a *de novo* burden-shifting analysis.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Reliable Consultants, Inc. d/b/a Dreamers. Respondent is the City of Kennedale, Texas. Pursuant to Supreme Court Rule 29.6, Reliable Consultants, Inc. makes the following disclosure:

Reliable Consultants, Inc. has no parent corporations and no public company owns more than ten percent of Reliable Consultants, Inc.'s stock.

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Petitioner Reliable Consultants, Inc. petitions this Court to review the Fifth Circuit's decision finding the City of Kennedale, Texas' adult business ordinance to be narrowly tailored. The court of appeals' decision misapplied this Court's ruling in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), by fashioning a more stringent standard of review for district court factual findings than is required by Civil Rule 52(a) and by failing to conduct a full burden-shifting analysis of the secondary effects issue. This Court should accept review of this case to correct the dangerous precedent established by the Fifth Circuit below.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit reversing the district court and finding the City of Kennedale's sexually oriented business ordinance to be narrowly tailored is reported at 480 F.3d 336. App. 3a. The Fifth Circuit's order denying *en banc* review is unreported. App. 1a. The district court's ruling invalidating Kennedale's ordinance is also unreported. App. 43a.

JURISDICTION

The decision of the court of appeals was issued on February 23, 2007. On March 23, 2007, the Fifth Circuit declined *en banc* review. The Court has jurisdiction under 28 U.S.C. § 1254(1) to review this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case implicates the Free Expression Clause of the First Amendment, which provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

STATEMENT OF THE CASE

Petitioner Reliable Consultants, Inc. does business within the City of Kennedale, Texas as Dreamers. App. 4a. Dreamers is a bookstore which sells video tapes, DVD's, magazines, and other print material of non-obscene, sexually explicit nature, as well as novelties, clothing, and other general merchandise. App. 4-5a. None of the materials sold at Dreamers can be viewed or consumed on premises and the store offers no live entertainment, viewing booths, or theaters at its Kennedale location. *Id.*

On May 27, 1999, the City of Kennedale annexed property from Tarrant County, Texas that included the location upon which Reliable is located. App. 4a. Within the annexed property, the City created an overlay district and passed specific regulations regarding the types of businesses that may lawfully operate there. At the time Reliable's property was annexed, the City's zoning code prohibited the location of a sexually oriented business within 800 feet of another sexually oriented business. App. 4a. The zoning code also limited operation of adult businesses to specific zoning districts and restricted the location of an adult business within 800 feet of certain protected uses, including residences. App. 4a.

Shortly after annexing Reliable's Kennedale location, the City enacted regulations which prohibited sexually oriented businesses from operating in the overlay zone. Those regulations set forth a three year amortization period within which all existing adult businesses, including Reliable, were required to relocate. App. 4a. Concerned that the additional zoning provisions, including the overlay district ban and the 800 foot distance requirement, left no available sites within the City upon which to relocate, Reliable filed its complaint

challenging the constitutionality the City's adult business zoning scheme. Among the concerns raised by Reliable was the fact that an insufficient number of alternative locations were available to accommodate the five adult establishments existing at the time in Kennedale, as well as the fact that the City had failed to sufficiently document its belief that such businesses cause negative secondary effects to the neighboring community. App. 4a.

In an attempt to rebut these claims, the City presented three categories of evidence to the district court: 1) outdated studies from other cities that address "adult bookstores" without defining that term;[1] 2) an opinion survey of land use appraisers conducted by the City's own attorney; and 3) citizen commentary at public meetings that failed to distinguish between Kennedale's on-premises and off-site adult businesses. App. 4a.[2] Based upon this evidence, the City argued that it met its burden of demonstrating that adult businesses in general, and bookstores with no on-site entertainment in particular,[3] generate unwanted secondary

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[1] The studies relied upon by the City are reprinted at App. 92a and 108a. While the text of the studies is complete, multiple tables and charts that are immaterial to the resolution of the issues in this petition were omitted due to printing constraints.

[2] The City also attempted to supplement its case with additional evidence of litter, traffic, and noise, but the district court rejected that attempt and refused to consider the new information. App. 28a, 37a. As such, the district court's assessment of the City's interests was limited to its initial evidence.

[3] The Fifth Circuit has adopted a more stringent narrow tailoring requirement where the businesses targeted by an adult entertainment ordinance offer no on-site entertainment. *See Encore*

effects. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986).

In reviewing the evidence initially submitted by the City, the district court conducted burden-shifting analysis under *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), to determine whether the City's evidence was "shoddy" or whether instead it fairly supported the City's rationale. App. 62-67a. At step one, the court excluded the city attorney's study on the grounds that it was so methodologically flawed as to be unreliable. App. 65-67a. Problematic in the court's view was the fact that the survey did not sufficiently limit its questions to take-home-only businesses, did not adhere to well-accepted standards of scientific rigor, and contained mixed results. Based on these deficiencies, the court labeled the city attorney study "shoddy" and excluded it from the narrow tailoring analysis. *Id.* The court also concluded that, because the citizen commentary did not identify take-home-only businesses as the source of the complaints, it too could not form a reasonable basis for regulating off-premises establishments like Reliable. App. 62-64a. With respect to the outdated, outside studies, the court further determined that the studies were too attenuated to the City's problems to be relevant. App. 64a. As the district court noted, the predicate studies from other jurisdictions entirely failed to distinguish between adult businesses with on-site entertainment and the more innocuous retail outlets without on-premises services. *Id.* Moreover, as the district court noted, the term "adult bookstore" is a term of art that has historically referred to establishments which

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Videos, Inc. v. City of San Antonio, 330 F.2d 288 (5th Cir. 2003). The validity and application of that standard is not at issue in this petition.

offer both on- and off-premises entertainment. *Id.* Not surprisingly, given the dearth of evidence supporting the City's secondary effects rationale, the district court invalidated Kennedale's adult business ordinance on the grounds that it was not narrowly tailored to the City's interests. App. 66-67a. The district court then awarded Reliable attorney fees under 42 U.S.C. § 1988 based on its status as the prevailing party. App. 12a.

The City appealed to the Fifth Circuit, arguing that the district court improperly categorized the city attorney survey as "shoddy" data under *Alameda Books*. The court of appeals, however, did not reach this issue, because it determined that the City's use of outside studies to document the secondary effects of off-premises businesses was reasonable. App. 10-11a. In this vein, the court concluded that the use of the term "bookstore" in the Indianapolis and Oklahoma City studies indicates that they were focused upon, and determined that secondary effects are caused by, take-home-only retail establishments. App. 9-10a. In reaching this conclusion, the Fifth Circuit failed to employ the burden-shifting analysis required by this Court's decision in *Alameda Books*, instead analyzing only the City's evidence without affording Reliable the opportunity to cast doubt on the City's rationale. Even more troubling is the fact that the court of appeals applied a *de novo* standard to the district court's finding as to the meaning of the term "bookstore," rather than the deference normally given to lower courts' factual determinations. App. 5a.

These missteps in the Fifth Circuit's analytic framework resulted in the court reaching the improper, and unjustified, conclusion that Kennedale's ordinance is narrowly tailored. Two key pieces of evidence available to the Fifth Circuit highlight the flaws in its overly narrow definition of the term

"adult bookstore." First, contrary to the court's ruling, neither the Indianapolis nor Oklahoma City study contain a definition of the term "bookstore," but elsewhere imply that the range of businesses addressed by the survey included those with on-site arcades. App. 103a (noting that a business named "Adult Arcade," whose title suggests that adult videos could be viewed on-premises, was included in the Indianapolis study group). Second, and more importantly, the City itself recognized that the Indianapolis and Oklahoma City studies did not distinguish between take-home-only and on-site establishments. In fact, the City commissioned a separate study to address take-home-only businesses specifically because it believed the Indianapolis and Oklahoma City surveys were deficient in that area. App. 74a. Thus, the Fifth Circuit not only applied an inappropriate standard of review to the district court's treatment of the bookstore studies, but also reached its own unsupported, and unsupportable, factual findings regarding the scope and meaning of the City's predicate studies.

Reliable promptly filed a motion for panel rehearing emphasizing these factual problems with the Fifth Circuit's opinion. Despite the numerous deficiencies in the court of appeals' reasoning, the panel refused the request. App. 2a. Reliable now seeks this Court's intervention to determine the proper standard of review, and in particular whether a district court's findings under *Alameda Books* are entitled to deference and are to be reviewed only for clear error, when an adult business challenges the secondary effects rationale underlying a municipal ordinance.

REASONS FOR GRANTING THE WRIT

I. Lower Courts are in Need of Guidance as to the Appropriate Standard of Review for District Court Factual Findings Under *City of Los Angeles v. Alameda Books, Inc.*

Pursuant to Civil Rule 52(a), a district court's factual findings may not be disturbed on appeal unless clearly erroneous. A finding resolves a question of fact when it constitutes a "conclusion by way of reasonable inference from the evidence." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163-64 (1988) (citing Black's Law Dictionary 569 (5th ed. 1979)). A finding is clearly erroneous under this standard only when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *See Anderson v. City of Bessamer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 392 (1948)). Under this rule, an appellate court may not reverse a factual finding merely because it would have ruled differently at trial. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). Moreover, where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous within the meaning of Civil Rule 52(a). *See United States v. Yellow Cab Co.*, 338 U.S. 338, 324 (1949).

To meet its burden of demonstrating that its sexually oriented business zoning ordinances were narrowly tailored as applied to Reliable, the City proffered two outside studies: one from Indianapolis and one from Oklahoma City. The City argued that because these studies contained the generic term "adult bookstore," they inherently must have referred to those stores that do not offer on-site entertainment. App. 8-

9a. As such, the City reasoned that the negative secondary effects documented in each of the studies must have been caused by take-home-only bookstores because those were the only businesses included in the surveys. *Id.*

The district court analyzed the City's assertions under this Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), and determined that the outside studies did not fairly support the City's rationale. App. 66a n.11. More specifically, the court held that, because the studies did not on their face exclusively address stores with no on-site arcades or theaters, the City acted unreasonably in interpreting them as evidence that take-home-only businesses cause secondary effects. App. 64-65a. Buttressing the court's determination were cases from a host of other jurisdictions that used the term "bookstore" in a broad sense to encompass not only those businesses that offer products for in-home consumption but also those that present on-premises entertainment. App. 64a (citing *United States v. Jenkins*, 46 F.3d 447, 449 (5th Cir. 1995); *Alameda Books*, 535 U.S. at 432). Relying both upon these cases and the definitional gaps in the studies themselves, the district court found that the City's reliance upon the Indianapolis and Oklahoma City studies for the proposition that take-home-only retail stores cause negative secondary effects was unreasonable. App. 65a. In so doing, the district court did not characterize the studies themselves as "shoddy" but rather ruled that the City's conclusions derived from the studies were unjustified, an important distinction in applying this Court's *Alameda Books* framework.

Under Rule 52(a) and this Court's decisions expounding upon the clearly erroneous standard, the district court's determination that the term "bookstore" contained in the outside studies did not refer to exclusively take-home-only

businesses was entirely factual. Nevertheless, the Fifth Circuit reviewed the district court's findings *de novo* rather than under the deferential standard required by Civil Rule 52(a). App. 5a. To reach this conclusion, the Fifth Circuit made two key errors. First, the court mischaracterized the district court's holding regarding the outside predicate studies as a determination that the studies were "shoddy," when the district court had merely ruled that the studies did not apply to take-home-only businesses. App. 10a. In this regard, the Fifth Circuit erroneously transformed what should have been a question of fact into a mixed question of law and fact. Then, based upon this mischaracterization of the district court's opinion, the circuit court applied a novel standard of review to the district court's *Alameda Books* findings: only the district court's findings as to the existence of a city's motives were reviewed under the clear error standard, while any determinations as to how those motives fit into the *Alameda Books* framework were reviewed *de novo*. App. 5a.

While at first blush this standard may not appear to be a departure from the clearly accepted standard of review, the Fifth Circuit's application of its newly crafted standard to Reliable is indicative of the fundamental problem with the test. The district court's ruling below contained both factual and legal components. First, the district court determined that the Indianapolis and Oklahoma City studies did not focus on only take-home-only businesses, but instead included within the category of adult bookstores those establishments that had on-site arcades and theaters. App. 64a. Then, based upon that finding, the lower court concluded that the City acted unreasonably in relying upon the outside studies in regulating take-home-only businesses given that they did not address that type of store exclusively. App. 64-65a. Pursuant to Rule 52(a), the former determination was purely factual and therefore entitled to deference. The latter decision, however,

which required application of the court's prior factual determination to the standards announced by this Court in *Alameda Books*, was a legal conclusion subject to *de novo* review. The Fifth Circuit confused the two standards and in essence reviewed the district court's findings as to the meaning of the term "bookstore" *de novo*. App. 10a.

The ruling below bastardizes the Rule 52(a) standard as applied to lower courts' *Alameda Books* determinations. Applying the Fifth Circuit's reasoning, only a district court's identification of the governmental interests at work in an adult business ordinance is reviewed for clear error, while factual determinations tantamount to those interests, such as the magnitude of the problem or the credibility of the witnesses, are subject to the court of appeals' own view of the facts. This turns both Rule 52(a) and this Court's decision in *Alameda Books* on their respective heads. It is clear from the *Alameda Books* opinion that this Court intended the district courts to play a pivotal role in determining the factual underpinnings of any adult business regulatory scheme. *See Alameda Books*, 535 U.S. at 435-37. It is equally clear from the text of Rule 52(a) that the district court is to serve as the arbitrator of facts in the federal court system. *See also* FED. R. CIV. P. 52(a), cmt. (1985) ("To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority."). Yet the Fifth Circuit's decision here, if allowed to stand, will remove the key fact-finding role from the district court and place it in the hands of the appellate courts, which have no contact with witnesses or evidence other than through the lens of a district court.

Absent intervention from this Court, the Fifth Circuit's ruling threatens to undermine Rule 52(a) and the deference entitled to district court fact-finding on the mistaken assumption that this Court's *Alameda Books* decision alters the analysis. It is therefore imperative that this Court intervene to further elaborate and define the standard of review applicable to a district court's *Alameda Books* factual findings.

II. This Court's Opinion in *City of Los Angeles v. Alameda Books, Inc.* is Silent as to Whether the Circuit Courts Must Conduct Burden-Shifting Analysis in Reviewing the Constitutionality of an Adult Business Ordinance *De Novo*, Conflicting with the Tenth Circuit's Decision in *Heideman v. South Salt Lake City*.

In *Alameda Books*, 535 U.S. 425, a plurality of this Court explained the evidentiary requirements for municipalities that have enacted speech-restraining regulations to prevent secondary effects. As the Court's ruling notes, first "the city certainly bears the burden of providing evidence that supports a link between" the regulation and the "asserted secondary effects." *Id.* at 437. At that stage of the challenge, the municipality "does not bear the burden of providing evidence that rules out every theory" opposing its theory or of providing evidence that is capable of supporting only that one theory. *Id.* at 437-38. Rather, the evidence must at a minimum be "reasonably believed to be relevant" in showing a connection between speech and effect. *Id.* at 438 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986)). However, as this Court admonished, that the government bears a less stringent burden at the initial stage of the burden-shifting framework is "not to say that a municipality can get away with shoddy data or reasoning." *Id.*

At the second step, a majority of this Court agreed that once the municipality's initial burden is met, the parties challenging the restraint have the burden of offering "a competing theory" or some "reason to question the city's theory." *Id.* at 437. They must "succeed in casting doubt on" the municipality's rationale either "by demonstrating that the . . . evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings." *Id.* at 438-39. If the parties challenging a regulation are able to call into question the municipality's reasoning, "the burden shifts back to the municipality to supplement the record with evidence renewing support" for the justification of the regulation. *Id.* at 439. Although different members of this Court disagreed somewhat as to the specific requirements of meeting these evidentiary burdens, the basic process of burden-shifting was not in dispute.

The Fifth Circuit entirely failed to apply the *Alameda Books* burden-shifting process in its treatment of Reliable's appeal. Instead, it simply rolled the entire analysis into one step, deeming the evidence provided by the City sufficient to justify the regulation. App. 10a. Under this Court's decision in *Alameda Books*, the evidence in this case was, at that point, substantively insufficient to allow the municipality to overcome even its first evidentiary burden. However, even if that evidence had been completely sufficient, the appeals court, applying *Alameda Books*, should have allowed the party challenging the restraint of speech to offer a competing theory. *See* 535 U.S. at 437. Leaving aside all question of the amount or quality of evidence needed to satisfy the first step in the process, the crux of the burden-shifting scheme is that parties challenging a regulation must have a chance to call the municipality's rationale into doubt, either to dispute the connection between the municipality's offered evidence and the regulation or to discredit the municipality's evidence

itself. *See Alameda Books*, 535 U.S. at 438-39. The Fifth Circuit's misapplication of *Alameda Books* and exclusion of the appropriate burden-shifting analysis deprived Reliable of that opportunity.

To be faithful to the dictates of *Alameda Books*, the Fifth Circuit should have conducted a *de novo* analysis of the evidence on both sides, applying the burden-shifting scheme as required by this Court. The City presented evidence to the district court as to the potential secondary effects of take-home-only businesses in an attempt to justify the scope of its ordinance. App. 62-65a. Likewise, Reliable presented evidence below in order to discredit the City's arguments. App. 64a. The circuit court should have analyzed the evidence on both sides according to the process established by this Court in *Alameda Books*. To the contrary, the Fifth Circuit's decision provided only a cursory resolution of the case based solely on the evidence provided by the City, leaving a remarkable void by not properly addressing and applying the burden-shifting process clearly explained by this Court.

The *Alameda Books* framework explained by this Court leaves appellate courts in a similar position as the Fifth Circuit with two plausible options: 1) to conduct a full burden-shifting inquiry *de novo*; or 2) to analyze the district court's analysis at each step of the burden-shifting process, remanding at the point of error for the district court to complete the remainder of the burden-shifting steps. The Fifth Circuit employed neither approach, instead subjecting only the first step – the City's initial burden – to *de novo* review. The court then concluded, based on that step alone, that the City's ordinance is narrowly tailored. App. 10-11a. This is in direct contrast to the Tenth Circuit's decision in *Heideman v. South Salt Lake City*, 165 Fed.Appx. 627, 2006

WL 245160 (10th Cir. Feb. 2, 2006), which expressly requires full *de novo* burden-shifting on appeal. *See id.* at 613, 2006 WL 245160, at *2 ("we view Plaintiffs' claims within the evidentiary burden-shifting framework set out by the Supreme Court in *City of Los Angeles v. Alameda Books, Inc.*") (citations omitted). Other courts applying *Alameda Books* have been noticeably silent as to the precise level of scrutiny to be applied to a district court's ruling, merely reciting that summary judgment decisions are reviewed *de novo* without acknowledging the role of burden-shifting in that analysis. *See, e.g., White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 167, 170 (2nd Cir. 2007) (reviewing summary judgment decision in favor of municipality *de novo* and discussing *Alameda Books* framework without connecting the two standards); *Andy's Restaurant and Lounge, Inc. v. City of Gary*, 466 F.3d 550, 552, 556-57 (7th Cir. 2006) (reviewing the constitutionality of adult business regulation *de novo* and also expressly applying the *Alameda Books* burden-shifting framework). The circuits have therefore adopted divergent viewpoints on the role of burden-shifting in an *Alameda Books* case and this Court should intervene to resolve the dispute.

CONCLUSION

For the reasons discussed in this petition, the Court should issue a writ of certiorari to review the decision of the Fifth Circuit.

This 21st day of June, 2007.

Respectfully submitted,

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